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UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

POCATELLO DENTAL Group, P.C., an
Idaho Professional Corporation

Plaintiff,

v.

INTERDENT SERVICE
CORPORATION, a Washington
Corporation

Defendant.

Case No.: CV-03-~~4962-00~~ ^{450-E-LMB}

**OPPOSITION TO PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION**

InterDent Service Corporation ("ISC") respectfully submits this memorandum in opposition to Pocatello Dental Group's (the "Group") Motion for Preliminary Injunction.

INTRODUCTION

The temporary restraining order ("TRO") before this Court is the product of gamesmanship, not irreparable injury. Despite being in the midst of negotiations with ISC, despite knowing how and where to contact ISC's counsel, and despite having competent counsel who surely understood the spirit and limitations of IRCP 65(b), the Group misled ISC and moved for the TRO without giving ISC and its counsel any notice. Why was no notice given? The

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answer is simple: The Group sought negotiating leverage in its ongoing dispute, and moving without notice increased the Group's chances of getting the leverage in place. For example, by not knowing a TRO was being sought, ISC lost the opportunity to show to the Idaho State Court that the requisite irreparable injury is absent here because (1) the alleged temporary loss of income to Dr. Romriell and his staff does not constitute irreparable injury, (2) the Group does not face possible professional liability claims if the Group simply had complied with the applicable professional rules regarding notice during the six months they knew Dr. Romriell would be leaving, and (3) most important, Dr. Romriell is already treating patients at his own practice in Pocatello, so the entire premise for the TRO is a sham.

Moreover, the Group cannot establish a substantial likelihood of succeeding on the merits and cannot show the alleged harm to the Group outweighs the substantial hardship to ISC, including that of keeping five staff personnel dedicated to Dr. Romriell when he is actually practicing across town. As shown below, the ex parte TRO is simply the latest in a series of actions taken by the Group to play fast and loose with the courts for the purposes of negotiating leverage.

STATEMENT OF FACTS

In October 1996, ISC paid the Group's shareholders \$2.8 million for the Group's nonprofessional assets and the right to provide management services to the Group. In connection with, and as part of, the \$2.8 million acquisition, the Group voluntarily entered into a Management Agreement with ISC. The Group now wants out of the Management Agreement, but its shareholders do not want to refund the \$2.8 million. As a relatively cheap alternative to refunding the \$2.8 million, the Group has filed this lawsuit hoping to convince this Court that the Group should be allowed to walk away from its obligations while keeping the \$2.8 million.

A. The Parties

ISC is in the business of providing or arranging for management services, facilities, equipment, and certain personnel necessary for the operation of dental practices. *See* Affidavit of Ivar Chhina in Opposition to Plaintiff's Motion for Preliminary Injunction, filed concurrently herewith ("Chhina Aff."), Ex. A at 1.

The Group consists of a limited number of shareholder-dentists and several "employee" dentists retained by the Group. *Id.*

B. The Acquisition

In October 1996, GMS Dental Group Management, Inc. ("GMS"),¹ the corporate predecessor to ISC, acquired (the "Acquisition") all of the nonprofessional assets of the Practice presently conducted by the Group² in exchange for payment of \$2.8 million. Affiants L.R. Misner, Jr. and Dwight Romriell were each paid \$400,000 in cash. *Id.* ¶ 2.

C. The Management Agreement

As part of the Acquisition, the Group entered into a Management Agreement with GMS dated October 11, 1996, (the "Management Agreement"). *Id.* ¶ 3, Ex. A.

The Management Agreement is a standard contractual agreement.³ Under the Management Agreement, professional and nonprofessional responsibilities are divided between Group and ISC, respectively. *Id.*, Ex. A.

¹ GMS subsequently changed its name to Gentle Dental Management, Inc. ("GDMI"). GDMI was later merged with and into Gentle Dental Service Corporation ("GDSC"). GDSC then changed its name to InterDent Service Corporation ("ISC"), which succeeded to all of GMS's right, title, and interest in and to all of GMS's assets, including GMS's right, title and interest in and to the Management Agreement. *Id.* ¶ 4.

² The Group was formerly known as Idaho Dental Group P.C.

³ *See* National Health Lawyers Association, Health Law Update, June 5-7, 1996 (stating that, in Idaho, physician practice management companies "often enter into arrangements with physician corporations. Generally, under such arrangements, the physician practice management company provides administrative services to the professional entity, while the professional entity provides medical services.").

The Group is "responsible for all aspects of the practice of dentistry and delivery of dental services," including the employment and termination of dentists at the Practice. In return for their services, the Group's shareholder dentists receive 38 or 39 percent of their net collections regardless of the amount of overhead or liabilities incurred by the Practice. *Id.* ¶ 5.

ISC is responsible for the administration of the Practice, including the provision of management services, facilities and equipment to the Group.⁴ *Id.* Unlike the Group dentists who enjoy a fixed percentage of collections, however, ISC profits only if the remaining 61 or 62 percent of net collections exceeds the overheads and liabilities of the Practice. This is because ISC is "responsible for paying all claims and obligations associated with the operation of Group," including salaries for nonprofessional staff, rent, equipment costs, and other overhead. *Id.*, Ex. A at § 2.6(b). Accordingly, ISC rather than Group bears the risks of cost control. *Id.* ¶ 5.

Because the Management Agreement places full financial responsibility for the salaries and overhead affiliated with nonprofessional staff on ISC, Group and ISC agreed that "[ISC] shall employ all non-Provider personnel necessary for the operation of the Practice." *Id.*, Ex. A at § 3.8(b). Further, "[ISC] shall select, hire, train, supervise, monitor and terminate all non-Provider personnel necessary for the operation and management of the Practice. . . ." *Id.*, Ex. A at § 4.4(b) (emphasis added).

⁴ Among other things, ISC is required to (1) provide all facilities, including office space, improvements, furnishings, equipment, supplies, and personal property, necessary for the efficient operation of the Practice; (2) serve as the purchasing agent for Group; (3) select, hire, train, supervise, monitor, and terminate all nonprofessional personnel; (4) provide day-to-day supervision of manager personnel, equipment and supply acquisition, office space and facility maintenance, patient records organization and retention, third-party payor contracting, case management, all billing and collecting activities of the Group, all operating aspects and policies of the Practice, including hours of operation, work schedules, standard duties, and job descriptions for all nonprofessionals and other related and incidental matters; (5) provide bookkeeping services and financial reports, including the implementation and management of a computerized management information system; (6) provide marketing and public relations services; and (7) provide administrative support for the Group's utilization review, quality improvement and outcomes monitoring activities, including data collection, analysis, and reporting for the Group Patients and Beneficiaries.

Contrary to the authority given to ISC regarding the employment of nonprofessionals, the Management Agreement prohibits ISC from contracting with and terminating professionals, stating that "[ISC] shall not employ or contract with any Providers [dentists] for the provision of dental services." *Id.*, Ex. A at §3.8(a). Instead, the Group "employ[s] or contract[s]" with professionals, subject only to the limited right of approval by the Joint Operations Committee (the "JOC").⁵ *Id.*, Ex. A at § 5.2. The Agreement states "Group shall retain ultimate responsibility for all activities of Group that are within the scope of a dentist's licensure and cannot be performed by [ISC] due to [ISC's] non-licensed status." *Id.*, Ex. A at § 3.2.

D. Relationship Between Group and ISC

The relationship between the Group and ISC recently has been difficult. As succinctly put by a consulting firm hired by the Group, the Group shareholder dentists "are having Seller's remorse." *Id.*, Ex. B at 14. Consequently, the Group dentists have refused to "respect the financial policy and procedure that has been established by the management company" and, in so doing, have undermined the financial stability of the Practice. *Id.* ¶ 7. For example, in the first quarter of 2003 alone, the Group wrote off over \$76,000 in dentistry as "professional" or "courtesy" discount, thereby diverting revenue from ISC.⁶ *Id.* ¶ 8.

In a report issued October 14, 2003, the Group's own consultant noted the disruptive conduct by the Group, stating that "it appears the Drs have not let go of ownership and handed things to management. There is a power struggle going on." *Id.*, Ex. B. The consultant attempted to explain the situation to the Group by way of analogy, stating that "[i]t is sort of like

⁵ The Joint Operations Committee consists of individuals employed by ISC and Group shareholders.

⁶ When ISC instructed the Group dentists that under the Management Agreement it had responsibility for billing matters and that such free services to friends and relatives would need approval from ISC management, ISC received communications from Dr. Dwight Romriell's lawyer threatening ISC and alleging, among other things, "HIPAA violations" and "federal mail violations." *Id.* ¶ 8, Ex. C.

when you have sold a car to a person and yet you want to keep the car to drive. The person you sold the car will usually not drive the way you do . . . but, they have paid for the car. Give it to them." *Id.* (emphasis added).

E. Dr. Romriell Left the Practice

In April 2003, Dr. Romriell gave notice he was leaving the Practice, effective October 11, 2003, to establish an independent office. *Id.* ¶ 12. ISC had no objection to the departure of Dr. Romriell (assuming he complied with his noncompete agreement) given the difficulty and delay often associated with TMJ collections, a practice area in which Dr. Romriell focused. *Id.* ¶ 20. Indeed, because of the problems affiliated with collecting payments for TMJ work, ISC does not work with any other group containing a dentist focusing on TMJ work. *Id.*

F. ISC Went Through a Chapter 11 Bankruptcy Proceeding

On May 9, 2003, ISC filed for bankruptcy reorganization under Chapter 11, *In re InterDent Services Corporation*, U.S. Bankruptcy Court for the Central District of California Case No. 03-13494, and obtained an order authorizing it to "operate its business and to perform its obligations, in the ordinary course of business pursuant to the Management Agreements with the Professional Corporations. . . ." *Id.* ¶ 9, Ex. D. In the bankruptcy, the Group dentists made many of the same claims as they do here (other than as related to Dr. Romriell) both in an adversary proceeding and in objecting to ISC's assumption of the Management Agreement.⁷ *Id.* ¶¶ 10-11, Ex. E.

In August 2003, during the bankruptcy proceedings, the Group unilaterally tried to rehire Dr. Romriell without consulting or obtaining the approval of the JOC as it is required to under section 5.2(b) of the Management Agreement. ISC responded by reminding the Group that a

⁷ ISC advised Group's individual shareholders' counsel that a JOC meeting would be the best forum for discussion of the Group dentists' concerns and that any action to terminate the Management Agreement would be contrary to the automatic stay under 11 U.S.C. § 1132. *Id.* ¶ 10, Ex. F.

JOC meeting was required before Group entered into an employment agreement. *Id.* ¶ 18, Ex. L. Moreover, ISC explained that it did not understand why it was necessary to have a dentist who wanted to focus on TMJ on staff instead of simply referring TMJ patients to an outside specialist. *Id.* The Group refused, and continues to refuse, to address this concern or honor its contractual obligation.

On October 3, 2003, only six days before it filed this action, the Group stipulated to the withdrawal of its claims and objections in the Bankruptcy Court.⁸ As such, the Group agreed that there were no breaches to the Management Agreement and that they would seek no corresponding cure payments. *Id.* ¶ 11. The Group kept secret its plan to refile its withdrawn claims just days later in state court. The Bankruptcy Court approved ISC's plan of reorganization on October 9, 2003, including the Group's stipulated dismissal.

G. Filing of the Complaint and Obtaining the TRO

In September 2003, shortly after Group unilaterally attempted to rehire Dr. Romriell, the Practice expenses for supplies and other items used by the Group dentists (but paid for in whole by ISC) inexplicably and dramatically increased—so much so as to cause the Practice to be unprofitable on an accrual basis. *Id.* ¶ 22. Nonetheless, despite the increasingly transparent tactics being used by the Group, ISC continued negotiations.

In early October 2003, ISC's president, Ivar Chhina, and the Group's former president, Dr. Misner, engaged in extensive discussions over Dr. Romriell's request for additional time to establish his own office. *Id.* ¶¶ 12-13. During these negotiations, and contrary to the spirit of the talks, the Group obtained a TRO ex parte on October 10, 2003. *Id.* ¶ 13. On the same day, Dr. Misner wrote to Mr. Chhina and reneged on the Group's previous offer to resolve this dispute. *Id.* ¶ 13, Ex. H. The letter did not mention the TRO. In response, Mr. Chhina called

⁸ Specifically, the Group stipulated that "[t]he Contract is assumed by debtor pursuant to the Plan

Dr. Misner and reinitiated discussions aimed at resolving the dispute regarding Dr. Romriell. Id.

¶ 14. Again, at no time during these discussions did Dr. Misner inform Mr. Chhina that the Group had already obtained a TRO. Indeed, the Group did not disclose the TRO to ISC until the papers were delivered to ISC's office manager in Pocatello on Monday, October 13, 2003, two days after the TRO was supposedly needed. Id.

On Friday, October 24, 2003, ISC learned of critical facts previously concealed by the Group. Id. ¶ 14. Specifically, ISC learned that Dr. Romriell had already established an independent office called "The TMJ Center" just a few miles away from the Practice and was treating TMJ patients. Id. ¶ 14, Ex. I, Ex. J. These facts are directly contrary to the sworn representations by Dr. Misner and Dr. Romriell that Dr. Romriell could not treat his patients unless a TRO was entered that (1) allowed Dr. Romriell to use ISC's facility and (2) required ISC to employ five staff members to assist Dr. Romriell.

The fact that Dr. Romriell is treating TMJ patients elsewhere eliminates any need for a TRO, especially the requirement that ISC continue paying the salaries of five nonprofessionals. Furthermore, because Dr. Romriell has started seeing patients at his private office, there have been large blocks of time during which Dr. Romriell has had no appointments at the Practice. Id.

¶ 15. For example, despite being scheduled to work on Friday, October 31, 2003 at the Practice, Dr. Romriell did not see a single patient. Id. Nevertheless, pursuant to the TRO, ISC is required to pay the salaries of five staff members who purportedly are needed to assist Dr. Romriell.

Immediately after discovering that Dr. Romriell was treating patients elsewhere, ISC demanded that the Group withdraw the TRO. Id. ¶ 14. The Group refused to do so. Tellingly, however, the phone number to Dr. Romriell's new TMJ Center was disconnected shortly thereafter but has now been reinstated, with the phone being answered by an ISC employee

[of reorganization], and no prepetition cure payments are due upon assumption." Id. ¶ 11, Ex. G.

whom ISC is required by the TRO to keep on its payroll. See Affidavit of Erik F. Stidham ("Stidham Aff.") ¶ 4; Affidavit of Bradley W. Ebert ("Ebert Aff.") ¶ 6.

ARGUMENT

The Management Agreement allows ISC to manage costs of the Practice⁹ by directly hiring and firing nonprofessionals and requires JOC meetings regarding decisions made by the Group regarding the employment of professionals. The Group's attempt to undo this agreement through the imposition of a mandatory injunction violates ISC's rights and fails to meet the stringent standards applicable to a request for the extraordinary and disfavored remedy of injunctive relief. This Court should therefore deny Group's attempt to gain additional leverage in its dispute with ISC through the imposition of an injunction.

H. The Group Faces a Heavy Burden

A preliminary injunction is described by the Ninth Circuit as "an extraordinary remedy, and will not be granted except upon a clear showing of probable success and possible irreparable injury." Associated Students, Inc. of California State University-Sacramento v. National Collegiate Athletic Ass'n, 493 F.2d 1251, 1257 (abrogated on other grounds) (9th Cir. 1974); see also Gomez v. Vernon, 255 F.3d 1118, 1128 (9th Cir. 2001) ("In general, injunctive relief is 'to be used sparingly, and only in a clear and plain case.'" (emphasis added) (quoting Rizzo v. Goode, 423 U.S. 362, 378 (1976))).

With this standard in mind, a movant must establish the following factors before a preliminary injunction may be issued:

(1) the likelihood of plaintiff's success on the merits; (2) the possibility of plaintiff's suffering irreparable injury if relief is not granted; (3) the extent to which the balance of hardships favors the respective parties; and (4) in certain cases, whether the public interest will be advanced by the provision of preliminary relief.

⁹ Recital A of the Management Agreement defines the "Practice" as all activities of Group subject to the Management Agreement.

U.S. v. Odessa Union Warehouse Co-op, 833 F.2d 172, 174 (9th Cir. 1987).

The moving party must show either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips in its favor. Id.

There is one more factor this Court must weigh. Where, as here, a party seeks a mandatory injunction that goes beyond simply maintaining the status quo, "courts should be extremely cautious about issuing a preliminary injunction." Stanley v. Univ. of Southern Cal., 13 F.3d 1313, 1319 (9th Cir. 1994) (emphasis added). Indeed, the Ninth Circuit has held that "[w]hen a mandatory preliminary injunction is requested, the district court should deny such relief unless the facts and law clearly favor the moving party." Id. (emphasis added).

Under the status quo, as established by the Management Agreement in 1996, ISC "shall have the sole responsibility and authority for decisions related to the administration of the Practice," including the authority to "select, hire, train, supervise, monitor and terminate" all nonprofessionals necessary for the operation of the Practice. *See* Chhina Aff., Ex. A §§ 3.4(a)(2), 4.4(b). Moreover, under the status quo, the Group is required to obtain the consent of the JOC before finalizing any of its decisions to hire or fire professionals, including the decision to rehire Dr. Romriell. Id. § 5.2(b). Because the relief Group seeks would necessitate altering the status quo through a Court-ordered modification of the Management Agreement, the Group's injunction is one that is subject to a very heavy burden.

II. The Group Is Not Entitled to the Extraordinary Remedy of Injunctive Relief

A. The Group Fails to Show Irreparable Harm

The Group asserts it will suffer irreparable injury if Dr. Romriell and his staff suffer a temporary loss of income pending the resolution of the Group's claims. *See* Group's

Memorandum in Support of Motion for Temporary Restraining Order, Order to Show Cause and

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Preliminary Injunction ("Group's Memo") at 18 (asking this Court to enjoin ISC from refusing to pay compensation and benefits to Dr. Romriell and his staff). The Group is incorrect. The Ninth Circuit, relying on the U.S. Supreme Court, has rejected this argument in holding that "temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury. . . ." Lydo Enter., Inc. v. City of Las Vegas, 745 F.2d 1211, 1213 (9th Cir. 1984) (emphasis added). The rationale for this holding by the Ninth Circuit, and the Supreme Court, is that "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." Id.

Moreover, the party seeking the injunction must prove irreparable injury to itself, not to others. It is axiomatic that "a showing of irreparable injury to others fails to meet the requirement that plaintiffs demonstrate irreparable injury to them, not to others. . . ." Nationwide Paging Corp. v. Regional Comm's, Inc., 1992 WL 355598, *3 (E.D.N.Y.) (emphasis added) (citing Weitzman v. Stein, 897 F.2d 653, 568 (2d Cir. 1990)). Any loss of income to Dr. Romriell's staff is not an injury to the Group. Accordingly, this does not satisfy the requirement of irreparable injury to the Group. Nor is any shortfall Dr. Romriell experiences as he builds up his new practice irreparable injury to the Group.

Likewise, the Group's next argument is lacking; the Group argues that irreparable injury exists because patients may need to seek treatment elsewhere and may be inconvenienced as a result. First, this argument is based on suppression of the fact that Dr. Romriell has already opened his new office. And again, this is not injury to the Group and, therefore, does not satisfy the irreparable injury requirement.¹⁰ Id.

¹⁰ Moreover, the Group overstates the facts regarding the inconvenience to Dr. Romriell's patients. For a complete discussion of the relevant facts, see section II.D., infra.

The Group further asserts it will suffer irreparable injury because it faces possible professional liability claims for abandoning its patients, pursuant to a rule of the Idaho State Board of Dentistry, IDAPA 19.01.01.10. This claim is disingenuous. The rule in question clearly states that a dentist can face professional liability only if he abandons a patient "without first advising the patient of such abandonment and of further treatment that is necessary." IDAPA 19.01.01.10. Thus the Group will not be in violation of the rule if it simply notifies patients, as it had six months to do, that Dr. Romriell will no longer be working with the Group. The patients would then have more than sufficient time to schedule an appointment at Dr. Romriell's new office or with some other dentist. The Group has not presented, and cannot present, this Court with any evidence of why it could not and did not (if it did not) give the required notice to Dr. Romriell's patients. The contrived concern of professional liability is a red herring and does not present the risk of any, let alone irreparable, injury to the Group.

Finally, ISC must come back to this essential point: the entire foundation for the Group's irreparable injury argument—that is, that Dr. Romriell will be unable to treat TMJ patients except at the Group's office—is untrue. The Group failed to disclose to the Idaho State Court that Dr. Romriell is already treating patients in his new office. Dr. Romriell recently opened an independent dental practice in the Pocatello area ("The TMJ Center") where he is actively treating patients—this, despite having just obtained a TRO forcing ISC to incur substantial costs in keeping five staff members employed at the Practice to assist Dr. Romriell. *Id.*, Exs. I, J. Moreover, ISC believes that Dr. Romriell has hired at least one of the nonprofessional staff members that ISC is currently required by the TRO to keep employed at the Practice. *See Stidham Aff.* ¶ 4. The Group omits these critical facts from its briefing and its affidavits. Given Dr. Romriell's competing practice, the Group's entire argument regarding irreparable injury is

not only wrong as a matter of law, it is wrong as a matter of fact. The Group's concealment of these facts from the State Court is simply inexcusable.

B. The Group Cannot Establish a Substantial Likelihood of Success on the Merits of Its Claim

Beyond having to prove irreparable injury, the Group must prove that the law and the facts "clearly favor" its claims that (1) ISC is precluded from exercising its right under Articles 3.8(b) and 4.4(b) to hire and fire nonprofessional staff, and (2) ISC cannot exercise its express right under Article 5.2(b), as part of the JOC, to approve the Group's employment decisions about professional staff. See Lydo, 745 F.2d at 1212. Moreover, the Group must prove a substantial likelihood of even being able to reassert its claims in this Court after stipulating to dismiss those claims in the bankruptcy court.

1. ISC's Ability to Hire and Fire Nonprofessional Staff

The Group apparently asserts that anything less than five staff members for Dr. Romriell will violate ISC's obligation under the Management Agreement to retain any nonprofessional personnel "necessary for the operation and management of the Practice."

The Group does not challenge the ability of ISC to hire and fire nonprofessionals. Indeed, the ability of a management company like ISC to hire and fire nonprofessional staff has "no fundamental impact on the 'modality' of delivery of health care services." Women's Medical Ctr. v. Finley, 469 A.2d 65 (N.J. Super App. Div. 1983). Recognizing this fact, the Group knowingly and voluntarily agreed in the Management Agreement that ISC would have "the sole responsibility and authority for decisions related to the administration of the Practice," including the authority to "select, hire, train, supervise, monitor and terminate" all nonprofessionals necessary for the operation of the Practice. See id.; Ex. A §§ 3.4(a)(2), 4.4(b). Such authority, of course, was central to the \$2.8 million acquisition given that ISC bears the sole financial risk of inflated overhead, such as unnecessary nonprofessional staff salaries.

The effect of Dr. Romriell's competing dental practice is clear. For example, despite being scheduled to work Friday, October 31, 2003, at the Practice from 8 a.m. to 1 p.m., Dr. Romriell saw no patients. Chhina Aff. ¶ 15. Nevertheless, under the injunction sought, ISC is required to keep five staff members employed to assist Dr. Romriell, including the staff apparently working at Dr. Romriell's competing practice, while Dr. Romriell simultaneously diverts and treats patients at his competing practice. Id.

The Group also neglects to discuss any of the factors that would allow this Court to determine whether ISC is properly exercising its right under the Management Agreement to hire and fire nonprofessionals. Such factors would include, without limitation, the hours worked by Dr. Romriell, the number of patients seen by Dr. Romriell, the number of nonprofessional staff needed by other dentists in the Group, the profitability of Dr. Romriell (especially after the opening of his competing dental practice), and the cost to ISC of employing all five nonprofessionals.

2. The Ability of ISC to Review the Financial Soundness of Group's Employment Decisions Does Not Give ISC the Power to Hire and Fire Professionals and Does Not Constitute the Practice of Dentistry by ISC

The Group agreed that it would submit to a meeting with the JOC before hiring any professionals. See Chhina Aff., Ex. A § 5.2. After approximately seven years of operating with the JOC, the Group now suddenly asserts that the contractually required meeting with the JOC somehow constitutes the improper practice of dentistry. Even if one puts aside the suspect timing, the Group's recent epiphany is without merit.

The Management Agreement states that "[ISC] shall not employ or contract with any Providers for the provision of dental services." Id., Ex. A § 3.8. As clarified in the affidavit of Mr. Chhina, ISC has always adhered to Article 3.8(a) and has never sought to hire or fire any professional, including Dr. Romriell:

ISC does not claim the right to hire or fire Dr. Romriell. He has been employed by the Group, not by ISC. The right ISC has under the Management Agreement is, in general, to approve or disapprove costs incurred by the Group that it will have to bear. Here, such costs would include Dr. Romriell's numerous staff personnel and his allocated share of office overhead.

Id. ¶ 16.

Despite the clear language of the contract, the Group asserts that Article 5.2(b) somehow permits ISC to hire and fire professionals. The Group's assertion is undue, however, given that neither the Management Agreement in general, nor Article 5.2 in particular, allows ISC to hire or fire professionals.

The Management Agreement carefully divides staffing responsibilities between the Group and ISC. Specifically, Article 3.8 states that "[ISC] shall not employ or contract with any Providers for the provision of dental services" and that "[ISC] shall employ all non-Provider personnel necessary for the operation of the Practice." Id., Ex. A § 3.8. The purpose for this calculated division of staffing responsibilities, of course, is to effectuate the intent of the parties, as expressed in Article 3.2, that "Group shall retain ultimate responsibility for all activities of Group that are within the scope of a dentist's licensure and cannot be performed by [ISC] due to [ISC's] non-licensed status." Id., Ex. A § 3.2.

Contrary to the allegations by the Group, Article 5.2 maintains the well-structured division of staffing responsibilities established in Articles 3.2 and 3.8 by reiterating the responsibility of the Group (not ISC) to contract with or terminate professionals. Indeed, Article 5.2(a) states that "Group [not ISC] shall employ or contract with the number of Professionals Group deems necessary for the efficient and effective operation of the Practice. . . ." Id., Ex. A § 5.2(a). The portion of Article 5.2 that the Group dislikes, and consequently seeks to repudiate, is the language in Article 5.2(b) requiring the Group to gain

approval from the JOC before negotiating or executing any employment agreement with a professional. Id., Ex. A § 5.2(b).

A careful reading of Article 5.2(b) shows that the right of approval is very limited and is fundamentally different from the right to hire and fire dentists.¹¹ Article 5.2(b) states, "Group shall not negotiate or execute any Provider Subcontract, Employment Agreement, or any amendment thereto, or terminate any Provider Subcontract or Employment Agreement without the approval of the Joint Operations Committee." Id. Nowhere in this language is ISC afforded the right to contract with or terminate professionals. Indeed, if ISC wanted to execute an employment agreement with a new dentist, it could not do so—not even under Article 5.2. Likewise, if ISC wanted to terminate an existing dentist in the Group, it could not do so. This is because Article 5.2 does not grant ISC or the JOC the power to contract with or terminate professionals.¹²

Under the plain language of Article 5.2, ISC has the contractual right to review and participate in JOC review of hiring staff to ensure that such hiring makes economic sense and would not create unnecessary and excessive overhead expenses fatal to the Practice. Id., Ex. A

¹¹ Reliance by the Group on Worlton v. Davis, 73 Idaho 217, 221-22 (1952), is misplaced. Worlton involved a nonprofessional partner in a co-partnership of physicians and surgeons who, unlike ISC, had the power to hire, fire, and control the work of, physicians. As noted by the court in Worlton, the employment agreement signed by physicians in that case stated that the physicians agreed to "work under the supervision and direction of the first parties [including the non-professional copartner] and obey first parties' orders and instructions" This agreement in Worlton, of course, is the polar opposite of the Management Agreement signed by ISC and the Group, which specifically states that "Group shall retain ultimate responsibility for all activities of Group that are within the scope of a dentist's licensure and cannot be performed by [ISC] due to [ISC's] non-licensed status." More specifically, the Management Agreement here, unlike the agreement in Worlton, precludes ISC from hiring or firing any professional staff.

¹² Moreover, the claim by the Group that the parties intended Article 5.2(b) to allow ISC to hire and fire professionals is contrary to the clear intent of the parties in Articles 3.2, 3.8 and 4.4(b) to assign the staffing of professionals to the Group and the staffing of nonprofessionals to ISC. It is illogical to assume that the Group and ISC, both of whom are sophisticated parties represented by counsel, painstakingly eliminated the power of ISC to employ professionals in Articles 3.2, 3.8 and 4.4(b) only to grant such a power to ISC in Article 5.2(b). Clearly, Article 5.2(b) was never intended by the parties to allow ISC to make employment decisions regarding professionals.

§ 5.2(b). Thus, by invoking the mutually agreed upon right of ISC under Article 5.2(b) to review the decision by the Group to rehire Dr. Romriell, ISC is not engaging in the hiring or firing of professionals; it is merely evaluating whether it would make economic sense for Dr. Romriell to be in-house as opposed to referring patients to him or other outside TMJ "specialists." As explained to the Group in a letter from ISC dated September 8, 2003:

ISC, of course, recognizes that it cannot engage in the practice of dentistry or interfere with the practice of dentistry by Group dentists. However, it is not clear to ISC why, if there is a need for a TMJ specialist, this need cannot simply be handled by a referral to an outside specialist. Nor is it clear that it makes business sense to have a specialist on staff. These are fundamentally business issues, not practice issues.

See Misner Aff., Ex. D.

Because there is nothing in Article 5.2(b) allowing ISC to contract with or terminate professionals, ISC cannot prove a substantial likelihood that it will prevail on its claim to void Article 5.2(b) and, consequently, cannot receive the "extraordinary relief" it seeks.¹³

3. The Group Cannot Prevail on the Merits of Its Claims Because Those Claims Assert Alleged Breaches Encompassed by the Bankruptcy Plan

There is no likelihood of the Group's prevailing on the merits of its claims because of the effect that this Court must give to the Second Amended Reorganization Plan (the "Plan") entered into on September 3, 2003. See 11 U.S.C.A. § 1141(a) (noting that "the provisions of a confirmed plan bind . . . any creditor . . . whether or not the claim or interest of such creditor . . . is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan"). The breaches of contract alleged by the Group arose before the date the Plan was confirmed and were well known to the Bankruptcy Court throughout ISC's

¹³ Although not critical to the interpretation of Article 5.2(b), the reasons for ISC wanting the opportunity to review the Group's decision to hire a TMJ specialist are relevant and informative. Simply put, TMJ work is not compatible with ISC's business model. The majority of collections on TMJ work are often time consuming and problematic. Indeed, ISC does not work with any group of dentists containing an individual touted as a TMJ specialist—nor should it be mandated to do so here.

Chapter 11 reorganization. See Stidham Aff., Ex. B at 12:15-17 ("This Order shall constitute a determination of the discharge of all the Claims and Interests in the Debtors, subject to the occurrence of the Effective Date.").

The Group, like any other creditor, is bound by the terms of the Plan and is therefore barred from bringing its breach of contract claims before this Court. See 11 U.S.C.A. § 1141(a); Stidham Aff., Ex. B ¶ 12.1 ("[T]he distributions and rights that are provided in the Plan shall be in complete satisfaction, discharge and release, effective as of the Effective Date of all Claims, whether known or unknown, against liabilities of, Liens on, obligations of, rights against and Interests in the Debtors, or any of their assets or properties, regardless of whether any property shall have been distributed or retained pursuant to the Plan on account of such Claims, rights and Interests, including but not limited to, Claims and Interests that arose before the Confirmation Date" (recognizing potential exceptions that do not apply here)).

C. Group Cannot Establish that the Damage It Allegedly Would Suffer Outweighs the Harm an Injunction Would Inflict on ISC

The Group cannot prove that the harm it claims it will suffer outweighs the harm an injunction will impose on ISC. See U.S. v. Odessa Union Warehouse Co-op, 833 F.2d at 174 (requiring a balance of hardships). The broad injunctive relief sought by the Group goes to the heart of the Management Agreement. Should the Group be granted the injunctive relief it seeks, the entire economic arrangement embodied in the Management Agreement would be undermined. See Chhina Aff. ¶ 6.

As noted previously, ISC bears all financial risks associated with the profitability of the Practice. Id., Ex. A § 2.6(b). If the Group had unlimited discretion to increase costs as they seek in this action, these costs would come entirely out of ISC's pocket. Id.

ISC will be damaged from a cash-flow perspective because it has to pay for Dr. Romriell's numerous staff and his overhead on a current basis but will only be reimbursed if

the collections by Dr. Romriell are sufficient—a dubious result given the recent discovery by ISC that Dr. Romriell is diverting patients away from the Group to his own private practice. Id., Exs. I, J.¹⁴

ISC is similarly damaged if the Court continues to manage the practice by injunction and, in so doing, continues to preclude ISC from effectively managing its staff. Id. ¶ 21. Actions by the Group and now the TRO have caused confusion and have undermined the authority of the ISC office manager. Id.

D. The Public Interest in ISC's Business Decisions is Minimal

To the extent the Group argues the public interest will be undermined by the alleged lack of treatment options available to TMJ patients, the Group overstates the facts. First, Dr. Romriell has already opened The TMJ Center in Pocatello. Indeed, according to Dr. Romriell, he is “now scheduling and seeing patients at the new office.” Id., Ex. I. Second, contrary to the claims by the Group, dental offices in Pocatello do provide TMJ treatment. See Ebert Aff. ¶¶ 2-6 (noting that of the 16 dental offices called in Pocatello, 12 provided some form of TMJ care). The Group has provided no evidence of why, or what percentage of, the limited number of TMJ patients currently being treated by Dr. Romriell could not be treated at one of those offices. Third, the majority of dental work done by Dr. Romriell at the Group is general dentistry that does not involve TMJ work. Chinna Aff., Ex. K (showing that the collections for TMJ work by Dr. Romriell are less than 25 percent of his total collections). Because all the Group patients are patients of the Group, not of individual dentists, other Group dentists are able to treat Dr. Romriell's general dentistry patients. Id.

¹⁴ Every week that the TRO is in place, ISC is being forced to pay nearly \$2,000 in wages to nonprofessional staff members assigned to Dr. Romriell. Id., Ex. K.

III. The \$10,000 Deposit of Undertaking by Group is Inadequate

The bond issued by a party seeking injunctive relief must be substantial enough to cover "such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." FRCP 65(c). The \$10,000 deposited by the Group is insufficient to cover the costs and damages as may be suffered by ISC. See Stidham Aff. ¶ 3. The Group should be required to post a bond in an amount sufficient to cover ISC's attorneys' fees during the pendency of a preliminary injunction, which could exceed \$200,000, plus the monthly salaries of Dr. Romriell and the five staff members he seeks to enjoin ISC from terminating.¹⁵

CONCLUSION

For the foregoing reasons, ISC respectfully requests that this Court deny the Group's Motion for Preliminary Injunction.

DATED this 22 day of November, 2003.

STOEL RIVES LLP



By: G.Rey Reinhardt
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¹⁵ Incredibly, the Group has indicated that it would attempt to pass through to ISC its costs for securing the TRO it obtained against ISC. Although it is premature to debate the issue, the Group's position is consistent with the overreaching it consistently demonstrated in its dealings with ISC.

CERTIFICATE OF SERVICE

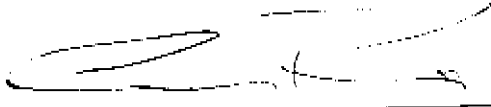
I hereby certify that I served the foregoing **RESPONSE TO TEMPORARY
RESTRaining ORDER** on the following named person(s) on the date indicated below by

- ☐ mailing with postage prepaid
- ☐ hand delivery
- ☐ facsimile transmission
- ☒ overnight delivery

to said person(s) a true copy thereof, contained in a sealed envelope, addressed to said person(s)
at his or her last-known address(es) indicated below.

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Ron Kerl
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COOPER & LARSEN
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DATED: this 8th day of November, 2003.



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